Peter James Binsted v Juvencia Autor Partosa

HIGH COURT (KUALA LUMPUR) — MAINTENANCE APPEAL NO R1-11-47 OF 1998
KC VOHRAH J
21 MARCH 2000

Family *— Maintenance — Paternity — Claim by wife that respondent was father of child — Whether court could order DNA test to determine paternity of child*

Evidence *— Proof of — Paternity — Whether court could order DNA test to be carried out to determine paternity of child*

The respondent applied for maintenance in the magistrates' court under s 3(1) of the Married Women and Children (Maintenance) Act 1950 ('the Act'). In her supporting affidavit, the respondent claimed that the appellant was her husband and that they had a child from the marriage. The respondent's lawyer made an oral application to the court to order the appellant, the respondent and child to, inter alia, undergo a deoxyribonuclei acid ('DNA') test. The magistrate allowed the application and the appellant appealed against that decision.

Held, allowing the appeal with costs:

There is no general power provided by legislation or through common law for any court in Malaysia to order a person to undergo a test to ascertain paternity. In the case of a DNA test, it is common knowledge that either a blood, tissue or bone specimen will be taken from the person for testing. If a person refuse to submit himself to such a testing, he is perfectly entitled to do so; a person cannot be subject to hurt within the meaning of s 319 of the Penal Code against his will by submitting himself to such testing. Whoever carried out such testing without the person's consent would violate s 323 of the Penal Code for voluntarily causing hurt to the person and a court cannot, in the absence of a specific legislative provision, order such person to submit himself to an unlawful act to be committed on his person (see p 571C–D).

[Bahasa Malaysia summary

Reponden telah memohon untuk nafkah di mahkamah majistret di bawah s 3(1) Akta Perempuan Bersuami dan Anak-Anak (Menguatkuasakan Nafkah) 1950 ('Akta tersebut'). Di dalam menyokong afidavit beliau, responden telah menuntut bahawa perayu adalah suaminya dan mempunyai seorang anak daripada perkahwinan tersebut. Peguam responden membuat permohonan lisan kepada mahkamah untuk mengarahkan perayu, responden dan anak tersebut untuk, antara lain, menjalani ujian asid 'deoxyribonuclei' ('DNA'). Majistret telah membenarkan permohonan tersebut dan perayu telah merayu terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan dengan kos-kos:

Tiada kuasa am yang diperuntukkan oleh perundangan atau common law untuk mahkamah di Malaysia untuk mengarahkan seseorang untuk menjalani suatu ujian untuk menentukan paterniti. Di dalam kes ujian DNA, ia adalah pengetahuan biasa bahawa darah, tisu atau spesimen tulang akan diambil daripada orang yang diuji. Jika seseorang enggan untuk menjalani ujian sedemikian, beliau berhak untuk berbuat demikian; seseorang tidak boleh dicederakan di dalam maksud s 319 Kanun Keseksaan tanpa kerelaannya dengan memaksa diri menjalani ujian tersebut. Sesiapa yang menjalankan ujian tersebut tanpa persetujuan orang tersebut akan melanggar s 323 Kanun Keseksaan untuk mencederakan orang tersebut dengan sengaja dan mahkamah tidak boleh, di sebalik ketiadaan peruntukan perundangan yang spesifik, mengarahkan orang sedemikian untuk patuh kepada suatu tindakan yang menyalahi undang-undang yang dilakukan ke atas dirinya (lihat ms 571C–D).]

Notes

For cases on maintenance of children, see 7 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2338–2343.

Legislation referred to

Family Law Reform Act 1969 (Eng) s 20
Married Women and Children (Maintenance) Act 1950 s 3(1)
Penal Code ss 319, 323

Appeal from: Maintenance Case No 78–21 of 1997 (Magistrates' Court, Kuala Lumpur)

Sharifah Sharlene (*Raja Darryl & Loh*) for the appellant.
WH Kan (*Azam Malek & Soh*) for the respondent.

Cur Adv Vult

KC Vohrah J: In the magistrates court, Juvencia Autor Partosa applied for maintenance for herself against Peter James Binsted (the respondent) under s 3(1) of the Married Women and Children (Maintenance) Act 1950 ('the Act'). In her supporting affidavit, she claimed that the respondent was her husband and that they had a child from the marriage.

The respondent disputed the marriage and that the child was his.

When the parties appeared in the lower court the applicant's lawyer applied orally to the court to order the respondent, the applicant and child to, inter alia, undergo a deoxyribonuclei acid ('DNA') test. The magistrate allowed the application and the respondent has appealed against that decision.

My concern in this appeal is not with the merits of the maintenance application which is yet to be decided by the magistrate. I shall only deal

with the narrow issue whether the order made by the magistrate is good in law.

At the outset it has to be noted that the Act has no provision to allow any court to make such an order. There is no other general provision in any other legislation that allows that too. This is quite unlike the position in England where s 20 of the Family Law Reform Act 1969 confers the court 'with the power upon a formal application to direct the use of blood test to ascertain paternity ... with his consent ...'. It will be seen that even then the provision does not empower the court to order blood test and even less the power to take blood from an unwilling party. All it does is to permit a direction by the court for the use of blood to ascertain paternity.

It is clear that there is no general power provided by legislation or through common law for any court in Malaysia to order a person to undergo a test to ascertain paternity. In the case of a DNA test, it is common knowledge that either a blood, tissue or bone specimen will be taken from the person for testing. If a person refuses to submit himself to such a testing he is perfectly entitled to do so; a person cannot be subject to hurt (ie suffer bodily pain, disease or infirmity) within the meaning of s 319 of the Penal Code against his will by submitting himself to such testing. Whoever carries out such testing without the person's consent would violate s 323 of the Penal Code for voluntarily causing hurt to the person and a court cannot, in the absence of a specific legislative provision, order such person to submit himself to an unlawful act to be committed on his person.

The magistrate's order is wrong in law and has to be set aside. I allow the appeal with costs.

Appeal allowed with costs.

Reported by Chin En Tek